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No. 10-2388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS MORE LAW CENTER; JANN DEMARS; JOHN CECI;
STEVEN HYDER; SALINA HYDER,

Plaintiffs-Appellants,

v.

BARACK HUSSEIN OBAMA, IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES, ET AL.,

Defendants-Appelees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Honorable George Caram Steeh
Civil Case No. 10-11156

BRIEF OF STEVEN J. WILLIS, URGING REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Steven J. Willis affirms that neither he nor anyone associated with him is or controls a subsidiary or affiliate of a publicly owned corporation. To the best of his knowledge, no public corporation not a party to this action has a financial interest in the outcome. Steven J. Willis is a private individual and has himself no financial interest in the outcome of this matter other than in his capacity as a taxpayer.

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INTERESTS OF *AMICUS CURIAE*[1]

The *amicus* is a Professor of Law who believes strongly that Section 1501 of the Patient Protection and Affordable Care Act, §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010) [PPACA], exceeds the bounds of Congress's constitutional authority by seeking to regulate individual *inactivity*—the decision *not* to purchase health insurance—which far exceeds the limited enumerated powers granted the federal government by Article I of the Constitution.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than *amicus*, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The district court's dismissal of this action was in error and must be reversed. The primary motivation for the Constitution was the Taxing Power. Article I, Sections 3, 8 and 9 sharply limit that power, as does the Sixteenth Amendment.

Section 1501 of the PPACA does two separate things. Incorporated into Internal Revenue Code (IRC) Section 5000A, it:

1. Mandates the purchase of health insurance by individuals.
2. Attempts to enforce the mandate by imposing a "penalty" upon individuals who violate the Mandate.

The district court's order, which upholds both the mandate and penalty under the Commerce Clause, amounts to an unlimited extension of federal power to regulate inactivity. In addition, it approves a virtually unlimited federal power to exact money from individuals, ignoring the most important limited enumerated power: the power to tax.

This Court should find the Mandate unconstitutional under the Commerce Clause because it forces individuals to engage in commerce, something heretofore never approved. Even if this Court were to approve the Mandate, it should find the enforcement penalty unconstitutional as exceeding Congress's limited power to exact money from individuals. The Commerce Clause does not itself provide for enforcement; instead, Congress must resort to the Necessary and Proper Clause.

For an enforcement provision to be constitutional, it must be consistent with the remainder of the Constitution and must not violate other provisions – particularly the limited Taxing Power, the primary motivation for the Constitution.

The Penalty under IRC 5000A is not a duty, impost, or excise. It is not a tax on income permitted by the 16th Amendment. At best, it is an un-apportioned Direct Tax on individuals. As such, it is unconstitutional.

ARGUMENT

This court faces four primary issues:

1. Whether the Mandate violates the Commerce Clause.

2. Whether the Enforcement Penalty violates the Necessary and Proper Clause.

3. Whether the Enforcement Penalty violates the Taxing Power.

4. Whether the Anti-Injunction Act precludes this Court from declaring the Enforcement Penalty unconstitutional.

To consider these issues, the Court should separate the Mandate from the Enforcement Penalty however inter-twined they may be statutorily. IRC Section 5000A includes both aspects of the law; however, the provisions implicate different constitutional provisions.

I. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY CONGRESS'S POWERS UNDER THE COMMERCE CLAUSE.

Others have adequately explained how the Mandate violates the Commerce Clause. This Brief will not repeat that issue other than to state the Court should strike the Mandate, if not the entire statute, on those grounds: the Mandate

unconstitutionally regulates individual inactivity, contrary to its limited power to regulate actual commerce. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010).

II. THE INDIVIDUAL PENALTY IS CONTRARY TO THE NECESSARY AND PROPER CLAUSE.

Even if this Court were to find the Mandate consistent with the Commerce Clause, it must nevertheless strike the Enforcement Penalty as unconstitutional under the Necessary and Proper Clause. U.S. Constitution Article I, Section 8, Clause 18. The Commerce Clause provides no enforcement mechanism; instead, Congress must use the Necessary and Proper Clause to enforce commercial regulations. Hence, enforcement measures must be both necessary and proper.

To be proper, an enforcement provision must be consistent with the remainder of the Constitution; otherwise, the power to do what is "proper" to enforce one limited power could eviscerate the limited nature of other specifically enumerated powers granted Congress. *See, United States v. Comstock*, 130 S.Ct. 1949 (2010); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Possible enforcement mechanisms are many. For example, Congress may exercise limited police powers to criminalize regulated commercial behaviors. The executive may seize property for public use, consistent with the Fifth Amendment obligation to pay just compensation. Congress, through the executive, may use militia powers to force or to impede actions violative of commercial regulations.

Congress – generally through the executive – may actually enter commerce by selling a product: specifically, it may do so with regard to postage and impliedly, it may do so with other products and services, such as those involving museums, parks, or flood insurance. Or, as is common, Congress may use its Spending Power to entice commercial behaviors deemed important. Critical to this matter, Congress chose none of those other possible enforcement mechanisms; instead, Congress chose to levy and to collect monies from individuals who violate its Mandate. Hence, whether some other form of enforcement mechanism for the Mandate would be constitutional as "proper" is irrelevant. Even if this Court approves the Mandate under the Commerce Clause, this Court must decide the limits of Congress's power to command individuals to pay money.

Much has been written and argued regarding whether the penalty is a regulatory penalty or whether it is a tax. Viewed properly, the enforcement penalty is subject to ***both*** sets of Constitutional limitations. The Commerce Clause is the only possible justification for the Mandate. The Taxing Power authorizes no such broad mandates other than the filing of returns, the maintenance of records, and similar procedural matters related to a "levy" or "collection." While Congress may use the Taxing Power to effectuate regulatory aims, it has never used it to *mandate* specific behavior by individuals, at least not prior to IRC Section 5000A. The Taxing Power is the only stated power to exact money from individuals (putting

aside the power to exact a criminal fine or to charge a price in the actual conduct of commerce by the government, issues not involved in this matter). Hence, the Mandate portion of the PPPCA must satisfy the Commerce Clause and the penalty must satisfy the Commerce Clause, the Necessary and Proper Clause, and the limited Taxing Power.

Of all the Constitutional provisions, the Taxing Power was the primary goal of the Convention: without money, the weak government under the Articles of Confederation could not provide for defense, regulate commerce or do much of anything. The Constitution mentions the limited Taxing Power four times (Article I, Section 1, Clause 3; Article I, Section 8, Clause 1; Article I, Section 9, Clause 4; and the Sixteenth Amendment), while it mentions the regulation of Commerce merely once (Article I, Section 8, Clause 3). Indeed the Taxing Power limitations bracket the Commerce Clause.

Our nation's founders were particularly concerned about taxes. That was a primary prompt for the Revolution: unfair taxes. Central to the Constitutional debate was how to treat exactions of money from the people. James Madison listed eleven Deficiencies of the Confederation. James A. Madison *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES*, THE PAPERS OF JAMES MADISON (1787) (Ed. by William T. Hutchinson, *et al*. University of Chicago Press 1977). First on his list was the lack of a ***Taxing Power***:

1. Failure of the States to comply with the Constitutional requisitions.

This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.

Similarly, Washington, LETTER, *George Washington to John* Jay (Aug. 1, 1786), Jefferson, LETTER, *Thomas Jefferson to Edward Carrington* (Aug. 4, 1787), and Hamilton, LETTER, *Alexander Hamilton to James Duane* (Sept. 13, 1780), each described the Taxing Power as either central to the Constitution or as a defect in the Confederation. And, the Supreme Court poetically described the Taxing Power as the most essential: "The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." *Nicol v. Ames*, 173 U.S. 509 (1899). Because, as the Court wisely noted, the power to tax is the power to destroy, the Constitution sharply limits the use of the Taxing Power.

Under Article I, Section 8, Congress can levy and collect taxes for the general welfare; however, the "general welfare" limitation is the least important of the Taxing Power limitations. The government has incorrectly argued the phrase is the primary limitation. Reply brief, *Thomas More Law Center v. Obama* (May 11,

2010, E.D. Mich.) at 27-28 (pp. 39-40 of Document 12). Indeed, the "general welfare" language primarily exists to limit what Congress may do with monies raised: it may use them to "pay the Debts and provide for the common Defense and general Welfare of the United States . . .." Grammatically, the phrase does not specifically limit the Taxing Power; instead, it creates and limits the Spending Power. The Supreme Court explained in 1936: "The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." *U.S. v. Butler*, 297 U.S. 1, 11 (1936).

Article I, Section 8, Clause 1 creates and limits the Taxing Power. Article I, Section 9, Clause 4 further limits the power, and the Sixteenth Amendment expands the power with further limitations. Per these provisions, taxes must be Direct or Indirect. Indirect taxes must be uniform. Article I, Section 8, Clause 1. Direct taxes must be apportioned. Article I, Section 9, Clause 4. Congress may levy excises, duties, imposts, direct taxes (including Capitations) and income taxes on "gross income" "derived" "from" a "source," the last four limitations appearing in the Sixteenth Amendment. These many restrictions are not trifles. Indeed, they are powerful limitations on the Taxing Power.

If Congress can evade those limitations by imposing non-criminal "penalties" exacting money directly from individuals, those essential limitations

lose all meaning. Any exaction now considered a "tax" could be re-labeled a commercial regulation enforcement penalty. Other than a capitation or other Direct Tax, almost all taxes involve commerce: income, transfers (such as gifts and descent), imports, the use of property, or the conduct of business. The few exceptions involve questionable issues extraneous to this case. *E.g.*, IRC § 4945 (The section imposes an excise on the political or lobbing activities of private foundations. While much lobbing and political activity involves commerce, arguably some has no impact on commerce. Whether this and a few similar provisions implicate the First Amendment is a powerful issue, not relevant here). If a non-criminal "penalty" were exempt from the alternative requirements of "uniformity," "apportionment," or "gross income derived from a source," those important words would essentially be repealed. That cannot be the proper result for this important case. How the Constitution limits criminal penalties is irrelevant to this matter, as the PPPCA penalty is non-criminal. *See*, JCT, ''Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act,''' 33 (Mar. 21, 2010), *Doc 2010-6147, 2010 TNT 55-23.*

Regardless of whether the Court denominates the Enforcement Penalty a "penalty" or a "tax," it must subject it to the powerful limitations imposed upon the levying and collection of monies from the people, in addition to whatever

limitations exist under the Commerce Clause. Anything else would not be proper. As the Court explained in *Butler,* "[t]he power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." *Butler*, *supra*, at 18. Similarly, resort to the Commerce Clause cannot be allowed to evade Taxing Power limitations.

If "*Necessary* and *Proper*" is to mean anything at all, it must not eviscerate other important Constitutional limitations. Indeed, it must not eviscerate the most important of all Constitutional limitations – those on the power of Congress to take money from the people. As explained below, if this Court finds the "penalty" is a tax, it must find it unconstitutional. Similarly, if this Court finds the "penalty" is merely a "penalty," it must nevertheless find it subject to the Taxing Power limitations. In either event, it must find the penalty unconstitutional.

III. THE INDIVIDUAL PENALTY IS CONTRARY TO THE LIMITED TAXING POWER.

To satisfy the limited Taxing Power, the penalty must fit one of five groups:

1. Duty
2. Impost
3. Excise
4. Direct Tax (including a Capitation)
5. Income Tax under the 16th Amendment

A. The Constitution Does Not Allow a Sixth Type of Tax

Although some have occasionally argued some other form of money exaction power exists, no one has ever discovered it, let alone explained it. No Court has recognized it. This would be a strange case to find such a power never before discovered in 225 years. For a fuller discussion, see Willis & Chung, "*Of Constitutional Decapitation and Healthcare*," 128 TAX NOTES 169 (July 12, 2010) (http://ssrn.com/abstract=1589190) [WILLIS & CHUNG I].

B. The Penalty is Neither a Duty Nor an Impost

No one claims the enforcement penalty is either a duty or an impost. The issue is appropriately not before the Court.

C. The Penalty is Not an Excise

The enforcement penalty is not an excise, albeit listed within the traditional excise provisions of the Internal Revenue Code. As the Code itself provides, the placement of a provision within Title 26 has no independent significance. IRC § 7806. Excises apply to:

1. The use of property
2. Services
3. The exercise of a privilege.
4. The behavior of entities.

Never has a United States excise applied to the *inactivity* of an individual. Much has been argued regarding whether Congress' power to regulate commerce can reach ***inactivity***. The lower court partially finessed this issue by labeling the matter being regulated as involving "economic decisions" and thereby partially avoided the activity versus inactivity issue. While that is incorrect Commerce Clause analysis, the denomination is irrelevant for purposes of analyzing the enforcement power under the Necessary and Proper Clause, inter-twined with the limited Taxing Power. However the Court may describe the reach of the Commerce Clause to regulate inactivity or mere decisions, no Court or commentator has ever argued the power to levy an ***excise*** reaches mere economic decisions of individuals, let alone inaction. Excises – particularly those on individuals - apply to actions – services, property use, and privilege exercises. If this Court were to define inactivity by an individual as the permissible subject of a uniform excise tax, it would eliminate an important distinction between taxes that are required to be uniform and those that are required to be apportioned. The *Hylton* Court made this point, if not in the most artful manner. *Hylton v. U. S.*, 3 U.S. 1 (3 Dall.) 171, 176 (1796) (Patterson, J.)); s*ee* the historic discussion of excises in WILLIS & CHUNG I at 181-85. Some entity excises have applied to the accumulation of monies. *E.g.*, IRC § 4943. The legitimacy of such indirect taxes is irrelevant to this matter, as all such examples have applied to entities rather than to individuals

(human beings). Excises on humans do not apply to mere decisions not to do something. If they did, they would be direct taxes, which must be apportioned. Apportionment is a critical limitation on Direct Taxes – a limitation which can indeed be failed, as it is by IRC Section 5000A. *See*, Willis & Chung, "*Oy Yes, the Healthcare Penalty is Unconstitutional*," 129 TAX NOTES 725, 727-28 (Nov. 8, 2010) (http://ssrn.com/abstract=1703575) [WILLIS & CHUNG II] (discussing the common misunderstanding of *Hylton, supra.*)

D. The Penalty is Not an Income Tax Under the 16th Amendment

The 16th Amendment authorizes, without apportionment, a tax on "incomes, from whatever source derived." That phrase includes several limitations:

1. The item taxed must be income.
2. The income must be derived.
3. It must be "from" somewhere.
4. The somewhere must be a "source."

Many cases elucidate the meaning of these provisions. *Commissioner v. Indianapolis Power and Light*, 493 U.S. 203 (1990); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955); *Eisner v. Macomber*, 252 U.S. 189 (1920).

a. The Penalty Does not Have a Proper Trigger

Some have argued the Penalty is an income tax because it is a percentage of an individual's income. Edward D. Kleinbard, ''*Constitutional Kreplach,*'' 128 TAX NOTES 755 (Aug. 16, 2010). That alone, however, does not cause IRC section

5000A to tax income; instead, it merely measures the amount of the penalty. A proper trigger for an income tax would involve an "accession to wealth clearly realized over which the taxpayer has complete dominion." *Commissioner v. Glenshaw Glass Co.*, *supra* at 431. Not having health insurance is not a proper trigger for a taxpayer's income from other sources. For a fuller explanation, *see*, WILLIS & CHUNG II AT 729-30; WILLIS & CHUNG I at 286-93.

b. The Penalty Does not Tax Income

The government, in its brief below, spoke of cost shifting as the primary cause for the penalty. Reply brief, *Thomas More Law Center v. Obama* (filed May 11, 2010, E.D. Mich.) at 3 (p. 15 of Document 12). Indeed, the shifting of costs from one individual to another would produce taxable wealth; however, the cost shifting the government decries – and the penalty attempts to reach – has not occurred and will not necessarily occur with regard to anyone. It is merely potential. Because it has not yet occurred, it cannot be the subject of an excise, nor can it be the subject of an income tax.

If the PPACA is upheld, some individuals may indeed purchase health insurance with pre-existing conditions and thereby shift costs to others, or they may seek medical services without the ability to pay for them. They may game the system and may deliberately plan to do so. But that potential is not the proper subject of an excise and it does not produce any income because it is not

inevitable. Some individuals will die without ever benefitting from the pre-existing conditions provision. Others will move to another country, and still others will be neglectful and never obtain care or insurance. As the Supreme Court explained in *Indianapolis Power*, the mere possibility of an accession to wealth is insufficient to produce income which can be taxed under IRC section 61 (which follows the 16th Amendment verbatim in all important aspects). *Indianapolis Power*, *supra* at 210-12 (1990). For an item to involve "gross income," it must be certain – and the alleged wealth allegedly taxed by the penalty is not.

c. The Wealth Allegedly Taxed has not Been Derived

Being derived is an essential aspect of income under the 16th Amendment. *Eisner v. Macomber*, 252 U.S. 189 (1920). Although *Macomber* has been severely limited, it nevertheless continues on this important issue. Thus even if some individuals are currently wealthier because they ***plan*** to defer purchasing insurance until they become ill, they have nevertheless not yet "derived" that income in a constitutional sense. For a fuller explanation, *see* WILLIS & CHUNG I at 189-91; WILLIS & CHUNG II at 730-31 (responding to the contrary view of Prof. Kleinbard).

d. The Alleged Wealth Did not Derive "from" Anywhere.

To be income constitutionally subject to tax, an item must not only amount to an accession to wealth which has been "derived," but it also must have been derived "from" somewhere. The mere performance of tasks for oneself – such as

mowing the lawn or living in one's own home – do not derive from anywhere other than oneself. They do not produce income in a constitutional sense. *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371, 379 (1934). ("The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment.") Similarly, the "economic decisions" and "self-insurance" spoken about in the district court are not items of income derived "from" anywhere but the individual's own mind. Such decisions are not properly the subject of an income tax under the 16th Amendment, just as they are not the proper subject of an excise.

e. The "Source" of the Alleged Wealth is the Individual's Own Personal Actions, Which is Insufficient.

The "source" test essentially re-enforces the "from" test of income taxation. To be "derived," the item must come "from" a "source." Never has a Court approved an income tax on wealth produced by an individual's decisions or actions for himself. A common example is well-known to tax students: if a person mows his lawn, he has no income despite having an accession to wealth, a nicer lawn. However, if that person mows the neighbor's lawn in exchange for the neighbor mowing his lawn, they each have *Glenshaw Glass* income: an undeniable accession to wealth, clearly realized, over which the taxpayer has complete dominion and control. Self-insurance – not the self-payment of expenses incurred, but the *mere acceptance of future risks* – is not the proper subject of an income tax,

just as it is not the proper subject of an excise. It is simply what people do throughout their lives: they accept the risk of living. At most, a tax or levy on such a thing is a Direct Tax on an individual. Any other view would render the concept of a Direct Tax meaningless.

E. The Penalty is Not an Apportioned Direct Tax or Capitation

Apportionment of Direct taxes is required by both Sections 3 and 9 of Article I. The "penalty" is not, however, apportioned by population, as the amount paid per State *per capita* will not be the same. Because it cannot satisfy any other of the limited Taxing Powers, the penalty is, at best, a Direct Tax. Because it is not properly apportioned, it is unconstitutional.

IV. THE ANTI-INJUCTION ACT DOES NOT PRECLUDE FINDING THE PENALTY UNCONSTITUTUIONAL

The district court correctly found the Anti-Injunction Act [Act] inapplicable to what amounts to declaratory relief. IRC § 7421(a). Two issues regarding the Act are relevant:

1. Declaratory Relief
2. Reach of the Act.

While not directly involved in this case, the Court should be aware the Act at most applies to persons. Under the Act, States are not persons. IRC § 7701(1). Although this particular case does not involve a State as a petitioner, the Court is undoubtedly aware of at least two other important cases involving relief sought by

States. The Act cannot preclude the Courts in those cases from deciding in favor of the petitioners. Hence, those cases will proceed, undeterred by the Act. This Court should adopt the district court's analysis of the Act in this vitally important matter which will inevitably move forward regardless of the Act.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the judgment of the district court.

Respectfully submitted,

/s/ Steven J. Willis

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CERTIFICATE OF COMPLIANCE

As counsel for *amicus curiae*, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is no more than 7,000 words, excluding the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Steven J. Willis
Steven J. Willis

CERTIFICATE OF SERVICE

As counsel for *amicus curiae*, I hereby certify that on this 24th day of December, 2010, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. The ECF system will automatically generate and send by e-mail a Notice of Docket Activity (NDA) to all registered attorneys participating in the case, which notice constitutes service on those registered attorneys

/s/ Steven J. Willis
Steven J. Willis